

IN THE SUPREME COURT OF MISSOURI

CITY OF LAKE SAINT LOUIS, MISSOURI,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	No. SC90790
	)	
CITY OF O’FALLON, MISSOURI,	)	
	)	
Defendant-Respondent.	)	

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SUBSTITUTE REPLY BRIEF OF  
APPELLANT CITY OF LAKE SAINT LOUIS

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Appeal from the Circuit Court of St. Charles County  
The Honorable Ted House, Circuit Judge

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Jay A. Summerville #24824  
(jsummerville@armstrongteasdale.com)  
Jeffery T. McPherson #42825  
(jmcpherson@armstrongteasdale.com)  
Jonathan D. Valentino #56166  
(jvalentino@armstrongteasdale.com)  
ARMSTRONG TEASDALE LLP  
7700 Forsyth Blvd., Suite 1800  
St. Louis, Missouri 63105  
314-621-5070 FAX 314-621-5065

ATTORNEYS FOR APPELLANT  
CITY OF LAKE SAINT LOUIS

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## ARGUMENT

THE TRIAL COURT ERRED IN DISMISSING THE PLAINTIFF'S PETITION BECAUSE THE PETITION STATED A CLAIM FOR RELIEF AND WAS NOT BARRED BY LIMITATIONS OR LACHES IN THAT THE PETITION SET FORTH FACTS SHOWING A JUSTICIABLE DISPUTE BETWEEN THE PLAINTIFF AND THE DEFENDANT AS TO THE BOUNDARY BETWEEN THEIR TWO CITIES, A DECLARATORY JUDGMENT IS THE APPROPRIATE METHOD FOR A BOUNDARY DETERMINATION, AND THE PETITION DID NOT SHOW ON ITS FACE THAT IT WAS BARRED BY LACHES OR LIMITATIONS.

The question presented by this appeal is whether the circuit court erred in dismissing an action seeking a declaratory judgment as to the boundary between two cities. O'Fallon's extended and inaccurate discussion of the law of quo warranto seeks to obscure the fact that the petition in this case clearly alleges a dispute between Lake Saint Louis and O'Fallon as to the location of the boundary between the two cities. The circuit court undoubtedly has the power to declare the rights of the parties. § 527.010, RSMo; Rule 87. The dismissal of this action is reversible error. This Court should direct the trial court to resolve this dispute on the merits for the benefit of the people of both cities.

O'Fallon's claim that Lake Saint Louis was required to seek a writ of quo warranto rather than a declaratory judgment is unsupported. O'Fallon did not and could not annex any portion of the incorporated area of Lake Saint Louis. There is no need to seek O'Fallon's ouster from an area that it could never annex. Quo warranto is only relevant in this case because -- as O'Fallon knows -- in order to overcome the express

limitations of Missouri's annexation statutes (which preclude the annexation of incorporated areas), the ouster of Lake Saint Louis from the subject property would need to occur before O'Fallon could annex it. It is undisputed that O'Fallon never sought to oust Lake Saint Louis from the area that Lake Saint Louis annexed in 1982. To the extent that the law of quo warranto has any bearing, it is death to O'Fallon's claims.

**I. O'Fallon has never annexed any portion of Lake Saint Louis.**

O'Fallon claims that the circuit court cannot entertain an action for a declaratory judgment as to where the boundary lies between Lake Saint Louis and O'Fallon. This contention is based on three assumptions that O'Fallon knows to be false. These three fallacies will be addressed in turn.

**A. O'Fallon could not annex incorporated land.**

Lake Saint Louis annexed property establishing its northern boundary in 1982, as shown by the annexation ordinance attached to the petition in this case as Exhibit 1. LF at 3, 6. O'Fallon claims to have *subsequently* annexed property within the boundary of Lake Saint Louis. LF at 4. As a matter of law, O'Fallon's claim is impossible.

It is well settled that there cannot be two cities exercising jurisdiction over the same area. *See Mayor, Councilmen & Citizens of City of Liberty v. Dealers Transport Co.*, 343 S.W.2d 40, 42 (Mo. banc 1961); *Wellston Fire Protection Dist. v. State Bank & Trust Co.*, 282 S.W.2d 171, 175 (Mo. App. 1955) (noting that intolerable confusion instead of good government would result in any territory in which two cities attempted to function at the same time).

Thus, under Missouri annexation law, a city only has the power to annex unincorporated areas. *See* § 71.012.1, RSMo (city “may annex unincorporated areas”); § 71.014, RSMo (city “may annex unincorporated areas”); § 71.015.1, RSMo (city may “annex any unincorporated area of land”).

Notably, O’Fallon’s brief fails to mention any of this legal authority that is squarely contrary to O’Fallon’s position. As a matter of law, O’Fallon’s claim to have annexed the incorporated area of Lake Saint Louis is wrong.

Since it could never legally annex the land of Lake Saint Louis, O’Fallon erroneously asserts that it might have accomplished “a *de facto* annexation.” Respondent’s Substitute Brief at 5. This claim must fail. According to O’Fallon, a *de facto* annexation can occur when a city meets four conditions:

- (1) a law under which it might lawfully have been incorporated;
- (2) an attempted compliance in good faith with the statute;
- (3) a colorable compliance with the statutory requirements; and
- (4) an assumption of user of corporate powers.

*Id.* (citing *City of Town & Country v. Goldman*, 778 S.W.2d 300 (Mo. App. 1989)).

If this standard were applicable (which Lake Saint Louis does not concede), O’Fallon would fail to meet it on all counts. O’Fallon does not cite any statute allowing annexation of incorporated land, and there is none. *See* § 71.012.1 (“unincorporated areas”); § 71.014 (“unincorporated areas”); § 71.015.1 (“any unincorporated area”). Indeed, O’Fallon’s brief contains exactly zero citations to any annexation statute.

O'Fallon's claimed annexation of incorporated land does not demonstrate an attempt to comply with the clear statutes authorizing annexation of "unincorporated areas." There is no sense in which the purported annexation of incorporated land could be said to be colorable compliance with Missouri annexation statutes. There is no evidence in the record that O'Fallon ever exercised any powers within the incorporated area of Lake Saint Louis.

Thus, O'Fallon cannot meet its own suggested requirements for de facto annexation. It is also clear that there could never be a legal annexation of the property under the facts of this case. The Court should reject O'Fallon's claim to have annexed property within the incorporated boundary of Lake Saint Louis.

**B. O'Fallon did not annex any portion of Lake Saint Louis.**

O'Fallon's argument proceeds from a declaration of fact that is simply untrue. At the very beginning of its argument before this Court, O'Fallon states: "Lake St. Louis admits that O'Fallon, between 1982 and the present, has annexed property, established a presence and exercised jurisdiction within an area sought by Lake St. Louis. [Appellant's Petition, L.F. 4, Paragraph 5, O'Fallon has 'annexed property, issued permits and taken other actions']." Respondent's Substitute Brief at 5.

This statement in O'Fallon's brief is false. Here is what the portion of the legal file cited by O'Fallon really says: "A dispute exists between the parties as to the northern boundary of Lake Saint Louis. O'Fallon disputes the northern boundary of Lake Saint Louis and *claims to have* subsequently annexed property, issued permits, and taken other

actions within the boundary of Lake Saint Louis as set forth in Exhibits 1, 2, and 3.” LF at 4 (¶ 5) (emphasis added).

O’Fallon’s partial quotation attempts to mislead the Court. Lake Saint Louis continues to deny that O’Fallon has ever annexed any property or taken any other actions within the boundary of Lake Saint Louis. As noted, O’Fallon could never legally annex the incorporated land of Lake Saint Louis. The Court should reject O’Fallon’s arguments in this appeal, which are all based on the false assumption that O’Fallon somehow completed an illegal annexation.

**C. O’Fallon would have to oust Lake Saint Louis before annexing any portion of Lake Saint Louis.**

As discussed at length in the opinion of the Missouri Court of Appeals in this case, as well as the first brief of Lake Saint Louis in this Court, O’Fallon is incorrect in stating that the exclusive remedy for Lake Saint Louis in this case is to proceed in quo warranto. But the law of quo warranto is relevant to this case in another way. Since Lake Saint Louis annexed the disputed area in 1982, the area would have to become unincorporated before O’Fallon could annex it. In order to achieve this, O’Fallon would have to prevail in an action to oust Lake Saint Louis from the area.

O’Fallon is well aware that it cannot annex the property that was annexed into Lake Saint Louis in 1982 without first ousting Lake Saint Louis from the area. O’Fallon is the losing party in another declaratory judgment action dealing with this very issue. In *City of Dardenne Prairie v. Cora Bopp L.P.*, No ED93590, pending in the Missouri Court of Appeals, Eastern District, Dardenne Prairie filed a declaratory judgment action to

annex a parcel of property. O’Fallon intervened, claiming that it had annexed the property years earlier (a claim rejected by the circuit court). O’Fallon strenuously protested that the property it claimed to have annexed could not properly be annexed by another municipality: “Dardenne Prairie is precluded from annexing incorporated areas of land.” No ED93590, Appellant’s Brief at 10.<sup>1</sup>

In the *Dardenne Prairie* case, O’Fallon noted that previously annexed property becomes incorporated into the annexing city: “The City of O’Fallon annexed the Subject Property on June 27, 2002, and extended O’Fallon’s boundaries around the Subject Property, causing it [to] become an *incorporated area of land.*” *Id.* at 11 (emphasis in original). O’Fallon noted that, as a matter of law, land that has already been annexed into one city cannot be annexed into another: “As the Subject Property was incorporated within the City of O’Fallon on June 27, 2002, other cities, including Dardenne Prairie, are precluded from annexing such property.” *Id.* at 13. Unlike its brief before this Court, O’Fallon’s brief in the *Dardenne Prairie* case is replete with references to the annexation statutes in Chapter 71 and the requirement that only unincorporated land can be annexed.

In attempting to win the *Dardenne Prairie* case, O’Fallon insisted that it would have to be ousted from the allegedly annexed area before any other city could annex it:

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<sup>1</sup> The Court can take judicial notice of the record in the matter pending in the Missouri Court of Appeals. *Stouse v. Stouse*, 270 S.W.2d 822, 826 (Mo. 1954); *Stickle v. Link*, 511 S.W.2d 848, 855 (Mo. 1974); *Burton v. State*, 641 S.W.2d 95, 100 n.6 (Mo. banc 1982); *Matthews v. McVay*, 234 S.W.2d 983, 988 (Mo. App. 1950).

“In order to overcome the express limitations in Section 71.015 R.S.Mo. which preclude Dardenne Prairie’s annexation of *incorporated areas of land*, the ouster of O’Fallon from the Subject Property would need to occur before Dardenne Prairie proceeded to annex the property. . . . As Dardenne Prairie is presently precluded from annexing the Subject Property under Section 71.015 R.S.Mo., the proposed annexation is not legally permissible.” *Id.* at 14 (emphasis in original).

O’Fallon emphasized this claim in its reply brief in the *Dardenne Prairie* case: “Unless successfully challenged in a proper action, O’Fallon’s 2002 annexation of the subject property stands and precludes subsequent attempts by other cities to annex the property under Section 71.015 R.S.Mo., which only authorizes the annexation of *unincorporated* land.” No ED93590, Appellant’s Reply Brief at 1 (emphasis in original).

According to O’Fallon’s own argument in the *Dardenne Prairie* case, O’Fallon lacked the power to annex the incorporated land of Lake Saint Louis at issue in this case. According to O’Fallon’s own argument in the *Dardenne Prairie* case, the only way O’Fallon could annex the area would be to oust Lake Saint Louis from it first. O’Fallon concedes that it never did so. Therefore, its claims in this case are refuted by its own arguments in the *Dardenne Prairie* case as well as the settled law.

**D. O’Fallon’s annexation argument should be rejected.**

O’Fallon’s claim to have annexed a portion of Lake Saint Louis is based on three propositions that are false. First, O’Fallon cannot legally annex an incorporated area of another city. Second, Lake Saint Louis has never admitted that O’Fallon effected any annexation of any portion of Lake Saint Louis. Third, Lake Saint Louis would have to be

ousted from its incorporated area before O’Fallon could annex any part of it. O’Fallon’s arguments, lacking any of the bases put forth by O’Fallon, should be rejected.

O’Fallon’s brief in the Court observes, “It is certainly not beyond experience to suggest that a municipality might undertake territorial expansion or seek to displace an incumbent government in order to selfishly capture taxes currently going elsewhere.” Respondent’s Substitute Brief at 23, n.8. This appears to be just such a case. It is clear that O’Fallon has attempted to intrude improperly on Lake Saint Louis.

## **II. Quo warranto is not the appropriate or sole remedy in this case.**

At the core of all of O’Fallon’s arguments in this case is the erroneous claim that this is an action to oust O’Fallon from jurisdiction. It is not. As noted, O’Fallon could not and did not annex any portion of Lake Saint Louis. Because it could not and did not obtain jurisdiction over any portion of the area at issue, O’Fallon has no jurisdiction from which to be ousted. There is no earthly reason why Lake Saint Louis should have to seek a writ of quo warranto to oust O’Fallon’s from jurisdiction that it could never possess.

In addition, O’Fallon’s quo warranto argument is simply wrong. It is clear that governmental entities like Lake Saint Louis have the right to bring a declaratory judgment action to resolve boundary disputes because the concerns compelling the traditional use of quo warranto in the context of an individual person’s claims are absent. *See State ex rel. Junior College Dist. of Sedalia v. Barker*, 418 S.W.2d 62, 65 n.1 (Mo. banc 1967); *Walker Reorganized Sch. Dist. v. Flint*, 303 S.W.2d 200 (Mo. App. 1957); *Reorganized Sch. Dist. R-I of Crawford County v. Reorganized School Dist. R-III of Washington County*, 360 S.W.2d 376 (Mo. App. 1962). It is undisputed that there is a

boundary between Lake Saint Louis and O’Fallon. This action seeks a declaratory judgment as to the location of that boundary.

The cases relied upon by O’Fallon are not relevant to this dispute between two governmental entities. At the outset, this Court explained that *Cherry v. City of Hayti Heights*, 563 S.W.2d 72 (Mo. banc 1978), was an action “pertaining to a collateral challenge by a private party to the incorporation of a municipality.” At the outset, this Court explained that *White v. City of Columbia*, 461 S.W.2d 806 (Mo. banc 1970), was an action by “property owners and taxpayers . . . attacking the regularity of . . . annexation proceedings.” The authority on which O’Fallon relies is readily distinguishable.

O’Fallon seeks to ignore the key distinction between suits by individuals and suits by governmental entities that this Court and the Missouri Court of Appeals have explained in *Barker, Walker, and Crawford County* (as well as the opinion of the Court of Appeals in this case). O’Fallon declares that the real difference between these cases and the cases cited by O’Fallon (*Cherry, White*, and dicta in *Lake Lotawana*) is that this action “was brought many years after one or more annexations by O’Fallon had occurred, and many years after O’Fallon had established a municipal presence and governmental structure within the area.” Respondent’s Substitute Brief at 15.

This is nonsense. *Barker, Walker, and Crawford County* do not purport to distinguish suits by individuals and suits by governmental entities on the basis of *time*, but rather on the character of the litigants and the nature of the rights to be enforced. *Walker* explains that a governmental entity may properly bring a declaratory judgment

action to determine the question of which entity has jurisdiction over an area because to do so would not implicate any of the reasons for the rule that an individual must proceed, if at all, by quo warranto: “Since the reason for that rule fails as applied to this case we do not apply the rule.” *Walker*, 303 S.W.2d at 205-06.

Further, O’Fallon’s argument assumes as true what O’Fallon knows to be false. As explained at length above, O’Fallon did not and could not annex any portion of the incorporated area of Lake Saint Louis. O’Fallon’s baseless assertion to the contrary does not detract from the force of *Barker*, *Walker*, and *Crawford County*.

O’Fallon advocates for the exclusivity of quo warranto without recognizing what this would mean. It has been held that a city alone cannot bring an action for quo warranto. Rather, a city requires the Attorney General or a county prosecutor to bring the action. *State ex rel. City of O’Fallon v. Collier Bldg. Corp.*, 726 S.W.2d 339, 340 (Mo. App. 1986). The power to determine whether a quo warranto proceeding shall be instituted is vested in the Attorney General and prosecuting attorneys. *See* § 531.010, RSMo; Rule 98.02; *State ex rel. St. Charles County Counselor v. City of O’Fallon*, 53 S.W.3d 211, 213 (Mo. App. 2001). Only the Attorney General or the prosecuting attorney may be the relator in a quo warranto proceeding. § 531.010; Rule 98.02(b)(1)(2). This is a jurisdictional requirement. *State ex rel. St. Charles County Counselor*, 53 S.W.3d at 213. The Attorney General and prosecuting attorneys exercise the sole discretion in determining whether to bring the action. *Id.*

The rule for which O’Fallon advocates would require Lake Saint Louis (population in 2003: approximately 12,000)<sup>2</sup> to obtain the agreement of the Attorney General or the St. Charles County Prosecutor to bring an action against O’Fallon (“the seventh largest city in Missouri and largest in St. Charles County, with a growing population of approximately 76,000 residents”).<sup>3</sup> If the prosecuting authority determined not to authorize an action, for any reason or no reason at all, the people of Lake Saint Louis or any other city would be left entirely without a remedy. If the prosecuting authority had a reason to favor one city over another, or if the prosecuting authority decided not to take sides, or if the prosecuting authority simply decided that he or she didn’t have a dog in the fight, a city and its people would have to endure the pendency of a dispute that could be resolved by a declaratory judgment.

This result would be arbitrary and unreasonable. In *Kilmer v. Mun*, 17 S.W.3d 545, 554 (Mo. banc 2000), this Court struck down a statutory requirement that a dram shop claim could only be maintained if the defendant had been convicted of a crime, holding that the requirement was arbitrary and unreasonable because it depended entirely upon the decision of the elected prosecuting authority to prosecute the defendant. The Court noted that the prosecutor’s decision on whether to bring an action “may, of course,

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<sup>2</sup> [http://www.lakesaintlouis.com/index.asp?Type=B\\_LIST&SEC={674BBC41-9BD3-42CF-9DDF-A4A2791CBE96}](http://www.lakesaintlouis.com/index.asp?Type=B_LIST&SEC={674BBC41-9BD3-42CF-9DDF-A4A2791CBE96})

<sup>3</sup> <http://www.ofallon.mo.us/>

be vulnerable to inevitable pressures of local politics or other factors unrelated to the merits, yet is wholly immune from review.” *Id.* at 552.

The Court in *Kilmer* held that the statutory prerequisite of action by a prosecuting authority violated the constitutional separation of powers “because the determination of whether a civil claim for relief exists is within the province of the legislature, or in the absence of legislative enactment, with the court as a matter of common law.” *Id.* at 552. The Court illustrated the separation-of-powers problem with several questions: “Would it be permissible for a statute to delegate to the state supervisor of liquor control the duty of ascertaining which dram shop cases were the most serious in deciding which plaintiffs should have a right to pursue a claim? Or, would it be permissible to delegate the permission to bring the claim to a member of the legislative branch, for example the tavern operator’s state senator? After all, if this function can be delegated to officials of the executive branch, why not to members of the legislative branch? Each of these possibilities invites arbitrary refusals of the right to pursue a claim.” *Id.* at 553. The meaning of *Kilmer* is that “the key to the courthouse door cannot be in the hands of an enforcement agency.” *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 257 (Mo. banc 2009).

*Kilmer* dealt with the claims of private litigants, not the rights of thousands of citizens of a city. The people of Lake Saint Louis have at least an equal interest in being free from arbitrary and unreasonable limitations on their right to obtain resolution of this dispute with O’Fallon. The Court should reject O’Fallon’s request to impose a new restriction on the right to seek a declaratory judgment.

In this Court, for the first time, O’Fallon declares that Lake St. Louis is “estopped from attempts to change boundary lines which have been recognized for decades.” Respondent’s Substitute Brief at 8, n.4. This claim fails for numerous reasons. First, and most fundamentally, this is not an action to change any boundaries. By its terms, the petition in this case seeks to enforce a boundary that has been in place since 1982. Second, O’Fallon never attempted to raise estoppel as a defense in the circuit court or in the Missouri Court of Appeals. A party cannot alter the basis of its arguments for the first time on transfer to this Court. Rule 83.08(b). Third, O’Fallon has abandoned reliance on the related doctrines of laches and limitations, which were raised below. Estoppel is not at issue in this appeal.

### **III. The petition states a claim for relief.**

An evident afterthought in O’Fallon’s brief is the baseless assertion that the petition fails to state a claim. This assertion ignores the plain terms of the petition, which states: “A dispute exists between the parties as to the northern boundary of Lake Saint Louis. O’Fallon disputes the northern boundary of Lake Saint Louis and claims to have subsequently annexed property, issued permits, and taken other actions within the boundary of Lake Saint Louis as set forth in Exhibits 1, 2, and 3.” LF at 4. On October 31, 2008, O’Fallon’s counsel wrote to St. Charles County officials to dispute the northern boundary of Lake Saint Louis, stating in part that adjudication of the dispute between O’Fallon and Lake Saint Louis should take place in circuit court. LF at 4. The petition alleged that Lake Saint Louis had a legally protectable interest in enforcing its

ordinances, collecting and administering taxes, and protecting the rights of the City and its residents within its boundaries. LF at 4.

As a matter of law, all of these facts set forth in the petition are deemed to be true for the purpose of reviewing the circuit court's ruling on the motion to dismiss. *Raster v. Ameristar Casinos, Inc.*, 280 S.W.3d 120, 127-128 (Mo. App. 2009). The Court gives the pleading its broadest intendment, treats all facts alleged as true, and construes the allegations favorably to the plaintiff to determine whether the averments invoke substantive principles of law that entitle the plaintiff to relief. *Id.*

Because a motion to dismiss for failure to state a claim is solely a test of the adequacy of the plaintiff's petition, the Court may not address the merits of the case or consider evidence outside the pleadings. *Id.* If the petition asserts any set of facts that would, if proven, entitle the plaintiff to relief, the petition states a claim. *Id.*

O'Fallon's argument baldly ignores the standard of review and should be rejected. The petition alleges a dispute between the parties as to the boundary between them.

#### CONCLUSION

In its brief before this Court, O'Fallon has not challenged most of the arguments advanced by Lake Saint Louis. O'Fallon's brief does not dispute that an action for a declaratory judgment is an appropriate vehicle to determine boundaries. *Shuffit v. Wade*, 13 S.W.3d 329 (Mo. App. 2000); *Dillon v. Norfleet*, 813 S.W.2d 31 (Mo. App. 1991); *Southern Missouri Dist. Council of Assemblies of God v. Hendricks*, 807 S.W.2d 141 (Mo. App. 1991). O'Fallon also does not dispute that courts are empowered to declare and determine the boundaries between political subdivisions. *See Oak Ridge Reorg. Sch.*

*Dist. v. Jackson Reorg. Sch. Dist.*, 830 S.W.2d 45 (Mo. App. 1992); *Witter v. St. Charles County*, 528 S.W.2d 160 (Mo. App. 1975).

Similarly, O’Fallon concedes that the judgment of the circuit court is reviewable de novo, with no deference to the decision of the court below. *See Reynolds v. Diamond Foods & Poultry Inc.*, 79 S.W.3d 907, 909 (Mo. banc 2002). And there is no dispute that the circuit court’s judgment is final and appealable. *See State ex rel. American Eagle Waste Industries v. St. Louis County*, 272 S.W.3d 336, 340 (Mo. App. 2008); *Manzella v. Dorsey*, 258 S.W.3d 501, 503 (Mo. App. 2008).

O’Fallon does not dispute that, in order to state a claim for declaratory judgment, the petition need only allege facts that invoke substantive legal principles that entitle the petitioner to relief. *State ex rel. American Eagle Waste Industries v. St. Louis County*, 272 S.W.3d 336, 340 (Mo. App. 2008). A plaintiff’s standing to claim declaratory relief and to assert a legally protectable interest is not impaired by the possibility that ultimately the plaintiff might not prevail. *Id.* at 341.

In light of these admissions, the only remaining issue is whether the petition states a claim for a declaratory judgment. As explained above, this issue should be resolved in favor of Lake Saint Louis.

For the foregoing reasons, the judgment of the circuit court should be reversed and the matter should be remanded to the circuit court for a resolution of the dispute between Lake Saint Louis and O'Fallon as to the location of the boundary between the two cities. The trial court should be directed to resolve this matter on the merits. In the alternative, this appeal should be retransferred to the Court of Appeals for reentry of its opinion.

Respectfully submitted,

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Jay A. Summerville            #24824  
(jsummerville@armstrongteasdale.com)  
Jeffery T. McPherson        #42825  
(jmcpherson@armstrongteasdale.com)  
Jonathan D. Valentino       #56166  
(jvalentino@armstrongteasdale.com)  
ARMSTRONG TEASDALE LLP  
7700 Forsyth Blvd., Suite 1800  
St. Louis, Missouri 63105  
314-621-5070    FAX 314-621-5065

ATTORNEYS FOR APPELLANT  
CITY OF LAKE SAINT LOUIS

CERTIFICATE OF SERVICE

A copy of this brief and a disc containing a copy of this brief were mailed, first-class postage prepaid, on August 9, 2010, to:

Kevin M. O’Keefe, Esq.  
Stephanie E. Karr, Esq.  
Curtis, Heinz, Garrett & O’Keefe, P.C.  
130 South Bemiston, Suite 200  
St. Louis, MO 63105

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 4,534, exclusive of the cover, signature block, appendix, and certificates of service and compliance.

The undersigned further certifies that the discs filed with the brief and served on the other parties were scanned for viruses and found virus-free through the Norton anti-virus program.

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